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# Supreme Court of the United States

October Term, 1957.

No. 225

HARRY ELEUTERI and EDWARD DANLEY,

*Petitioners,*

*-vs-*

DAVID D. FURMAN, ATTORNEY-GENERAL OF THE STATE OF NEW JERSEY, and MARTIN J. QUEENAN, Burlington County Prosecutor,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

JAMES M. DAVIS JR.
*Attorney of Petitioners*
110 High Street
Mount Holly, New Jersey

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SUPREME COURT OF THE UNITED STATES

October Term, 1957.

No.

HARRY ELEUTERI and EDWARD DANLEY,
*Petitioners,*

*vs.*

DAVID D. FURMAN, Attorney General of the State of New Jersey, and MARTIN J. QUEENAN, Burlington County Prosecutor,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petition of Harry Eleuteri, of 134 Second Street, in the City of Bordentown, and of Edward Danley, of 52 East Main Street, Columbus, in the Township of Mansfield, both in the County of Burlington and State of New Jersey, respectfully shows:

A.

They respectfully seek a writ of certiorari to the Supreme Court of New Jersey which entered a judgment on the opinion of Mr. Chief Justice Weintraub, a copy of which is appended hereto and which is reported in 26 N. J. 506, 141 A. 2d. 46 (1958). The judgment of the Supreme Court of New Jersey affirmed the judgment of the Superior Court of New Jersey entered on the judgment of Judge Conford, which is reported in 47 N. J. Sup. 1, 135 A. 2d 191 (1957) and which is printed in the Appellants' Appendix submitted herewith at page 47a, et seq. The latter judgment affirmed a summary judgment for the defendants entered in the Superior Court of New Jersey on an opinion by Judge Haneman, which is re-

ported in 43 N. J. Sup. 303, 128 A. 2d 743 (1956) and is found also in Appellants' Appendix in the Supreme Court of New Jersey, submitted herewith, at page 36a, et seq.

*B.*

The grounds on which the jurisdiction of this court is invoked are:

In their amended complaint filed in the Chancery Division of the Superior Court of New Jersey, the plaintiffs claimed the immunity from unreasonable searches and seizures, guaranteed to them by the Fourth and Fourteenth Amendments to the Constitution of the United States; they claimed the right under the same amendments to have their property, unlawfully seized, returned to them; and they claimed the right to be relieved of or an immunity against the use by the respondents of their property against the petitioners in the prosecution of criminal indictments by reason of the same amendments in combination with the second and third clauses of Article VI of the Constitution of the United States.

They also claimed the federal right to be protected against unreasonable searches and seizures which were part and parcel of a State-sponsored and sanctioned, but nevertheless unlawful, unwarranted, unjustifiable, and unconstitutional police incursion into their privacy in violation of the Fourteenth Amendment to the Constitution of the United States as construed by 69 Sup. Ct. 1359, 1361 (1949). The court of original jurisdiction denied the relief sought and that result has been affirmed twice, most lately by the Supreme Court of New Jersey.

I. The date and time of entry of the judgment of the Supreme Court of New Jersey, sought to be reviewed is April 28, 1958.

II. No order respecting a rehearing has been sought or allowed. Neither has any order granting an extension of time within which to petition for certiorari been sought or allowed.

III. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is 28 United States Code 1257 (3), 28 U. S. C. A. 1257 (3).

C.

The questions presented for review are:

1. If a state officer seeking search warrants made two verified complaints to a magistrate in which he stated that he had "been reliably informed that gaming is taking place" in violation of law in the premises sought to be searched, one of which premises he describes by the wrong street number, and each of which premises he refers to as the residence of John Doe, his complaints making no other description of the persons to be seized and no description of the things to be seized; if the magistrate was lacking jurisdiction to issue the writs prayed for; if there was no statute authorizing the search or seizure; if search warrants issued in conformity with the prayers of the complaints; if searches and seizures of money and papers were made; and if the money and papers so seized are even now retained by state officers, do the searches, seizures, and the retention of the money and papers constitute a violation of the right of security guaranteed by the Fourth Amendment to the Constitution of the United States and a deprivation of liberty or property, or both, without due process of law, forbidden by the Fourteenth Amendment to the Constitution of the United States?

2. If, following the searches and seizures described in question #1, indictments were returned against the plaintiffs, in a state court, charging each of them with the crime of bookmaking; and if the plaintiffs filed complaints in a state court of general jurisdiction against the County Prosecutor and the Attorney General of that state, the latter of whom could at his pleasure assume the prosecution of the indictments; if their complaints charged that searches and seizures of their property took place in violation of the Constitution of the United States as aforesaid, that their property was being held from them by officers subject to

the authority of the defendant, Attorney General, and that the defendants, who had each taken the oath required by Article VI, Clause 3 of the Constitution of the United States, would, unless restrained, offer and use as evidence against the plaintiffs the money and papers seized, the courts of the state following the "non-exclusionary rule" of evidence; and if the complaint sought by way of relief the return to the plaintiffs of their property, or its destruction, or an injunction against its use as evidence in court by the defendants, do the complaints set forth a cause of action under the Fourth and Fourteenth Amendments and Section VI, Clauses 2 and 3 of the Constitution of the United States?

3. If the plaintiffs' said complaints in addition alleged that for many years, in light of the fact that the "non-exclusionary rule of evidence" is followed, that state and its law enforcement officers had affirmatively sanctioned, practiced, and encouraged unlawful, unwarranted, unjustifiable, and unconstitutional police incursion into the privacy of its citizens and that the searches and seizures complained of were part and parcel of this policy, do the complaints state a federally protected cause of action?

*D.*

The constitutional provisions which the case involves are as follows:

Article VI, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Article VI, Clause 3:

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound

by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the

United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

*E.*

**Statement of the Case**

On August 22, 1954, Trooper George Dann, of the New Jersey State Police, executed affidavits or verified complaints before Magistrate Charles C. C. Ellis, of Chesterfield Township, for the purpose of obtaining search warrants to search 134 Second Street, in the City of Bordentown, New Jersey and 54 East Main Street, Columbus (in the Township of Mansfield), New Jersey. These complaints were attached to the complaint filed by the plaintiffs in the Superior Court of New Jersey as Exhibits "A" and "C" respectively and can be found at pages 13a and 16a of the plaintiffs' appendix. They make an attempt to describe the houses to be searched and each of them claims the property to be searched to be in the possession of one John Doe. Trooper Dann in these complaints stated that he had just and reasonable cause to suspect and did suspect and believe that gaming in violation of a New Jersey statute was taking place in each of the said premises and that his

reasons for suspecting and believing so are that he has been reliably informed that gaming is taking place there. He does not attempt to describe either the person or things things to be seized but does pray for a search warrant to search for money, evidence and all other paraphernalia used in connection with gaming on the premises. Magistrate Ellis had no jurisdiction to receive these complaints or issue search warrants to be executed outside of the municipality which he served. Nevertheless he issued search warrants on the same day. Members of the New Jersey State Police executed the warrants except that as to the Mansfield Township warrant, they did not execute that at 54 East Main Street but they entered and searched 52 East Main Street, for which premises they had no search warrant. They seized money and papers of the petitioners, Harry Eleuteri and Edward Danley, which money and papers they have and continue to retain.

Thereafter a Grand Jury empaneled and sworn in the Superior Court of New Jersey in and for the County of Burlington returned an indictment against each of the petitioners charging them with bookmaking in violation of the gambling laws of the State of New Jersey.

The petitioners on March 29, 1956, filed their complaint in the Superior Court of New Jersey, Chancery Division, a copy of which is reproduced commencing at page 2a of the appendix. In their complaint, they charge that the searches and seizures and retention of their papers and money was all done and being done in violation of the Constitution of New Jersey and of the Fourth and Fourteenth Amendments of the Constitution of the United States. They named as defendants, Martin J. Queenan, who was and is the County Prosecutor of Burlington County, and Grover C. Richman, Jr., who was the Attorney General of New Jersey. They further charged that the courts of the State of New Jersey had long ago adopted the so-called "non-exclusionary rule of evidence" in such cases and that the law enforcement officers of the State of New Jersey knowing this, for many years had affirmatively sanctioned, practised and encouraged unlawful, unwarranted, unjustifiable and unconstitutional

police incursion into the privacy of its citizens and that these law enforcement officials including the defendants themselves, encouraged their subordinates to take advantage of unconstitutional and unlawful searches of the persons and property of New Jersey citizens, well knowing that the only remedy available to an injured citizen was an action for damages (P25a, 5-33). The complaint further charged that the searches and seizures perpetrated upon the petitioners here were carried out as part and parcel of that policy (P28a, 20). The complaints further alleged that the defendant, Queenan, or the defendant, Richman, plan to undertake the prosecution of the indictments against the petitioners and that the defendant, Richman, was the governmental superior of those very officers who were in possession of the plaintiffs' property seized and retained as aforesaid. They sought a declaration of their rights, an accounting and return of their property or the destruction thereof by the court if it should be declared to be contraband and an injunction against the defendants from carrying these papers and these monies into court and from offering the same in evidence against the petitioners at the trial of said indictments. They also sought a permanent injunction against the defendants from further affirmatively sanctioning police incursion into the privacy of the plaintiffs and other citizens of the State of New Jersey (P29a, 30 to P31a, 6).

The defendants sought a summary judgment on the ground that the complaint failed to state claims upon which relief could be granted (P18a, 17). At the time of the argument of the motion what were believed to be formal deficiencies in the complaint were discovered and the court agreed to deal with the motion on its merits permitting a formal amendment later. The Chancery Division of the Superior Court in an opinion rendered by Judge Vincent S. Haneman held that the complaint with its proposed amendments did not state a claim upon which relief could be granted and determined that the defendants were entitled to summary judgment (P36a, 22), 43 N. J. Sup. 303, 128 A. 2d 743 (1956).

On February 4, 1957, an order was entered granting leave to amend the complaint (P19a) and an amended complaint

was filed (P20a). Also on February 4, 1958, an order for summary judgment in favor of the defendants was entered (P46a). Petitioners then appealed to the Appellate Division of the Superior Court of New Jersey (P1a).

The Appellate Division affirmed (P71a) on an opinion delivered by Judge Conford (P47a), 47 N. J. Sup. 1, 135 A. 2d 191 (1957). The petitioners then appealed to the Supreme Court of New Jersey, the highest court of that state (P72a, 1). The Supreme Court in an opinion written by Mr. Chief Justice Weintraub (page 1a of this petition and reported in 26 N. J. 506, 141 A. 2d 46, (1958)), affirmed. The mandate of the Supreme Court of New Jersey on affirmance was entered and filed on April 28, 1958. A copy of this mandate will be found at page 11a of this petition.

This petition seeks a writ of certiorari to review the judgment of the Supreme Court of New Jersey.

During the pendency of the appeal, Mr. Richman's term as Attorney General expired and David D. Furman was designated the Acting Attorney General of New Jersey. The Supreme Court of New Jersey entered an order substituting Mr. Furman as a party defendant in the place of Mr. Richman. That order is copied at page 12a of this petition. Mr. Furman has since been appointed and is now the Attorney General of New Jersey.

*F.*

This is a petition in which review of the judgment of a state court is sought. The federal questions sought to be reviewed were raised in the amended complaint filed by petitioners, (P21a, 11, Paragraph 4; P21a, 21, Paragraph 5; P21a, 27, Paragraph 6; P21a, 37, Paragraph 7; P22a, 12, Paragraph 8; P22a, 35, Paragraph 9; P23a, 24, part of Paragraph 10; P25a, 5, Paragraph 11; P26a, 32, part of Paragraph 14; P27a, 15, Paragraph 15; P28a, 16, part of Paragraph 16; P28a, 20, Paragraph 17; P29a, 30, Prayer A; P31a, 22-42, where Paragraphs 4 to 11 of the First Count of the amended complaint are incorporated by reference to the Second Count, P32a, 34, part of Paragraph 14; P33a, 17, Paragraph 15; P34a, 11, part of Paragraph 16; P34a, 19, Paragraph 17, which incorporated by reference Paragraph

17 of the First Count; P34a, 28, Prayer A).

The questions of law including the constitutional questions and the federal questions came before the court as questions of law on a motion for summary judgment (P18a, 17). Judge Haneman of the Chancery Division recognized the fact that the petitioners had raised federal questions in the following language:

> "Plaintiffs further allege that:
>
> "The above acts constituted a violation of the rights guaranteed to them under the Fourth Amendment to the Constitution of the United States, and through the Fourteenth Amendment of the Constitution of the United States the violation is a taking of their liberty and property without due process of law. The defendants were obligated to take an oath to support the constitution of the United States and the threatened conduct of the defendants is indicative of an official conscience departing from the obligation of the oath required by the Constitution of the United States, and actually taken by the defendants.
>
> "By way of relief they demand an injunction, the affect of which would be to direct the official conscience of the defendants in such fashion as to be consistent with and in harmony with the due process of law under the Fourteenth Amendment, including the obligations of the defendants to observe the rights the plaintiffs enjoy under the Fourth Amendment to the Constitution." (P37a, 39–P38a, 21.)

He determined that the remedy was discretionary and that the court should exercise its discretion even though the court found that the petitioners' constitutional guaranties had been violated and that the violation caused irreparable and imminent damage to the plaintiffs by saying:

> "Even though we should concede, for the sake of argument, that the violation of the constitutional guarantees causes irreparable and imminent damage to plaintiffs, this court should refuse to act.

"The remedy of specific performance is not a matter of strict right but rather one of sound judicial discretion." (P43a, 38–P44a,6).

Since the appeal to the Appellate Division of the Superior Court was from an order which determined that the complaint failed to state claims upon which relief can be granted, the sufficiency of the complaint was the issue to be determined by the appellate courts.

Judge Conford, in the Appellate Division, stated the issues raised by the appeal as follows:

"At the argument of the motion for summary judgment leave was granted to plaintiffs to file, for the record, an amended complaint to cover certain factual contentions inadvertently omitted from the complaint, but included within the scope of the argument on the motion. In essence, the amended complaint sets forth the following grievances. As to the plaintiff, Eleuteri, it is charged that one George Dann, a trooper in the State Police, subordinate to and under the control of the defendant, Attorney General Richman, on August 22, 1954 searched plaintiff's 'premises' at 134 Second Street in the City of Bordentown and took and carried away 'papers, money and property' belonging to him and that the search and seizure was illegal and unreasonable, in violation of specified provisions of the New Jersey and United States Constitutions in the respects: (a) that the only authorization for the search was a search warrant issued by the magistrate of the Municipal Court of the Township of Chesterfield, which was without jurisdiction in the City of Bordentown, and (b) that the warrant did not 'particularly' describe the papers and things to be seized; that as a result of the said search the predecessor of the defendant, Prosecutor Queenan of Burlington County, procured an indictment of plaintiff, charging him with what is commonly known as bookmaking and possession of lottery policy slips, both constituting statutory criminal offenses, and that the said defendant holds the papers and property so seized for use at

the trial of the plaintiff, being dependent thereon to establish a prima facie case against him; that both defendants are sworn to uphold the Constitutions both of New Jersey and of the United States; that the New Jersey courts of law as distinguished from the courts of equity, have so construed Article I, paragraph 7, of the New Jersey Constitution of 1947, securing the people from unreasonable search and seizure, and its predecessor provision under the Constitution of 1844, as to deny the people the right to be 'secure' in the sense intended by the Constitution of New Jersey and by the Fourth Amendment of the United States Constitution, the benefits of which extend to the citizen as against state action by virtue of the Fourteenth Amendment of the United States Constitution, particularly in that they have permitted papers and effects of citizens unauthorizedly searched and seized to be exposed to public view and used as evidence in the prosecution of such citizens for crime and have refused to suppress such papers and effects and return them to their owners notwithstanding that the search and seizure was illegal; that because of the 'uniform and well established construction' of the Constitutions in the manner stated, the State of New Jersey and its law enforcement officers, including the defendants, have 'affirmatively sanctioned, practiced and encouraged' unlawful police incursion into the privacy of citizens and that defendants have 'encouraged' their subordinates to take advantage of unconstitutional searches; that the search of plaintiff's home was 'part and parcel' of that illegal policy of the State of New Jersey; and that the remedy afforded by the New Jersey law courts for illegal or unconstitutional searches is an action for damages, which is inadequate and will not compensate plaintiff for being convicted of crime as a result of evidence obtained in violation of his constitutional rights. Wherefore the complaint of the plaintiff, Eleuteri, sought judgment declaring the search illegal and the retention by defendants of the papers and effects seized to constitute a continuing

unconstitutional seizure of his property, requiring defendants to return the property to the plaintiff or to deliver it to the court 'for destruction'; and enjoining defendants from offering any of the effects in evidence at the trial of the indictments and from any further unconstitutional searches of plaintiff's premises, and any further 'sanctioning in an affirmative way police incursion into the privacy of the plaintiff and the other citizens of the State of New Jersey.'

"As to the plaintiff, Danley, the complaint follows the same pattern except that the premises searched in this case were situated at 52 East Main Street in the Village of Columbus, Township of Mansfield, and the illegality charged, in addition to the jurisdictional and other defects in the warrant asserted on behalf of plaintiff, Eleuteri, includes the specification that the warrant authorized a search of Number 54, rather than 52, East Main Street." (P47a, 14–P49a, 22).

The Appellate Division of the Superior Court of New Jersey affirmed the Chancery Division (P71a). It suggested that the petitioners should have a remedy and that that remedy should be a motion for the suppression of the evidence but it left this question to be answered by the Supreme Court of New Jersey in the following language:

"It is the considered view of this bench that for the reasons set forth above both the vindication in a particular case of the constitutional rights of the subject of the illegal search and the prospective protection of the right of privacy of citizens, generally, require the sanction of suppression as evidence of property seized in violation of the constitutional guaranties. There should, moreover, be no differentiation based upon the degree of the violation, if violation there be. See Boyd v. United States, supra (116 U. S., at p. 635). But considerations of appropriateness compel us to defer to our highest court for a first instance judicial determination of the question left open in Application of Berlin, supra." (P67a, 5-17).

It further determined that the defendants were under a duty to present to the criminal court such evidence as they had since the State of New Jersey adhered to the non-exclusionary rule, and that a violation of their oaths should be punished by sanctions, saying:

> "If it is the law of this State that a defendant in a criminal prosecution has no right to an order from the court of criminal jurisdiction returning or suppressing as evidence property unconstitutionally taken from him—and we have decided not to hold otherwise in this case—it remains the duty of the defendant law enforcement officers to hold and present the evidence when the case comes to trial. True, as argued by plaintiffs, it is defendants' sworn duty to uphold both State and Federal Constitutions. Any participation, direct or indirect, on their part, in the constitutional transgression here involved would have been a violation of their respective oaths of office. (There is no charge here that there was such participation.) But the present status of the matter is that they are preparing to perform their duty to present evidence of crime in a pending prosecution. That, too, is their constitutional duty. If the case law of this State is to the effect that they cannot be diverted from that course by reason of the taint attending the procurement of the evidence, a contrary result cannot be accomplished in the name of enforcement of their oaths of office. There are appropriate sanctions for a violation of an oath of office. This action is not one of them." (P68a, 20–P69a, 5).

As to the charge that the State of New Jersey and its law enforcement officials were affirmatively sanctioning a policy of police incursion into the privacy of its citizens counter to the guarantee of the Fourteenth Amendment, it said:

> "The allegations in the amended complaint concerning affirmative sanction, practice and encouragement by the State of New Jersey and its officers, including defendants, of unconstitutional searches and seizures,

> are designed to bring the case within the statement in the opinion of the court in Wolf v. Colorado, supra, 'that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment' (338 U. S., at p. 28). Neither the complaint nor anything said on behalf of the plaintiffs in the argument supports the thought that their contention is anything more than that the case rule 'against suppression or exclusion of illegally secured evidence' tends to encourage violation of the constitutional guarantee. This is not an affirmative sanction by the State of illegal searches and seizures. There is no suggestion of any concerted, planned or general program by the state law enforcement authorities for disregard of the constitutional requirements for search and seizure. We do not find a grievance grounded in the Wolf exception properly invoked by the complaint in this case, because we perceive no genuine factual allegations in the complaint warranting its entertainment, nor do we apprehend that any would be forthcoming were the complaint again amended. Cf. Di Cristofaro v. Laurel Grove Memorial Park, 43 N. J. Super. 244 (App. Div. 1957). (P69a, 9-34).

In conclusion, Judge Conford said for the Appellate Division:

> "Since the approach taken by the court in this case has turned on the merits of the claim of constitutional infringement, there is no occasion to consider the authorities cited by plaintiffs supporting the concept of equitable jurisdiction to protect the right of privacy. (Citing cases) Our decision, technically, sustains the right of the defendants to pursue the course upon which they were embarked when the complaint was filed." (P70a, 5-16)

The Supreme Court of New Jersey also had before it the legal sufficiency of the petitioners' complaint including the determination of the federal questions therein set up and considered by the two lower courts. Chief Justice Weintraub recognized that the constitutional issues raised by the petitioners formed the right upon which the petitioners had access by appeal to that court, for he said:

> "Defendants obtained summary judgment on motion. 43 N. J. Super. 303 (Ch. Div., 1956). The Appellate Division affirmed, 47 N. J. Super. 1 (1957), and the plaintiffs are before us as of right because of the constitutional rights asserted." (Page 2a infra).

The Supreme Court of New Jersey conceded that the search warrants had been issued when the magistrate had no jurisdiction to issue them. (Page 2a infra). It found no substance in the contention that the search warrants were void for want of a statute expressly authorizing them. (Page 2a infra). It held that the papers and things to be seized were explicitly described and that the variance in the street number in the case of the Danley warrant was immaterial. (Page 2a infra). It held that the trooper acted in good faith. (Page 3a infra).

The Supreme Court of New Jersey appears to have thought that no federal right was involved and that the issue was as to whether or not it should depart from its long standing non-exclusionary rule for said the Chief Justice,

> "The quarrel centers about the need, appropriateness and efficacy of the exclusionary rule." (Page 5a infra).

Again the learned Chief Justice said,

> "At the oral argument we invited particularization, but nothing emerged to justify the probable purpose of the pleader to wedge into the area in which the Supreme Court indicated in Wolf that it would not intervene." (Page 10a infra).

As to the charge that the State of New Jersey and its law enforcement officials affirmatively sanctioned unconstitutional police incursion into the privacy of the citizens, the court said,

> "We agree with the Appellate Division that this charge is a mere assembly of generalities, devoid of specific content." (Page 10a infra).

The Supreme Court of New Jersey by affirming the judgment of the two lower courts held that the federal issues raised by the petitioners had no merit.

*G.*

Not applicable to this petition.

*H.*

1.

**The Searches and Seizures to Which The Petitioners Were Subjected Were Violative of The Fourth and Fourteenth Amendments to The Constitution of The United States.**

In *Wolf vs. the People of Colorado*, 338 U. S. 25, 27, 69 Supreme Court 1359, 1361. This Court made the guarantees of the Fourth Amendment enforceable against the States through the Due Process Clause of the Fourteenth Amendment. In this case, the homes of the petitioners were subjected to searches by officers of the New Jersey State Police which were proported made on the authority of search warrants, the granting of which concedingly was upon the jurisdiction of the magistrate who issued them. They were, therefore, void and afforded the officers no protection. *Wolf vs. People of Colorado*, 338 U. S. 25, 30; 69 Supreme Court 1359, 1362, Note 1.

By the terms of the Fourth Amendment, the people have a right to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. That right of security is one which is not to be violated. The Fourth Amendment also enjoins that no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized. Since the decision of this Court in the *Wolf* case, in 1949, all of these requirements of the Fourth Amendment are for the benefit of the people against State action whether a search and seizure is unreasonable, is now a federal question; whether or not a warrant has issued upon probable cause is a federal question; whether or not the oath which supports the search warrant particularly describes the place to be searched and the person or things to be seized are federal questions.

In the case at bar not only were the search warrants issued by a magistrate who had no jurisdiction over them but the Complaints or oaths upon which they were based set forth

no facts upon which a magistrate could determine whether or not probable cause for the issuance of a search warrant existed. P13a and P16a. Trooper George Dann, who made the Affidavits, in them said, "that he has just and reasonable cause to suspect and does suspect and believe that the premises with buildings thereon * * * is being knowingly used as a place, where gaming is taking place, in violation of N. J. S. 2A:112-3, and that his reasons for suspecting and believing that said violations are taking place are as follows:

"That he has been reliably informed that gaming is taking place in the premises known as the above described property."

He not only set forth no facts but he assertively shows that he had no knowledge of the situation, that a third-party-informant had the knowledge if anyone did, that the third-party-informant remains nameless, and that the magistrate to whom the applications were made had nothing on the basis of which he could determine whether a search warrant should or should not issue. In issuing the search warrants complained of, the magistrate apparently relied upon Trooper Dann's statement that "he has just and reasonable cause to suspect and does suspect and believe that the premises with buildings thereon is being knowingly used as a place where gaming is taking place." In other words, the magistrate allowed the Trooper to decide the question of probable cause and the Judicial intervention required by the Fourth Amendment to the Constitution of the United States consisted solely of finding and selling the land in a ministerial fashion.

In *Byars vs. United States*, 273 U. S. 28, 47 Supreme Court 248 (1927) and in *Grau vs. United States* 287 U. S. 124, 53 Supreme Court 38 (1932), this Court held that search warrants might not properly be issued on the strength of affidavits which merely asserted the belief of the affiant that certain facts were true and that searches conducted on warrants issued pursuant to such Complaints were in violation of the Fourth Amendment. In the latter case this Court in an opinion by Mr. Justice Roberts said, "a search warrant

may issue only upon evidence which would be competent at the trial of the offense before a jury and would lead a man of prudence and caution to believe that the offense has been committed." In this case, neither the Complaints nor the warrants attempted to describe any of the things to be seized. The Complaints prayed for a search warrant "to search for money, evidence, and all other paraphernalia used in connection with gaming in and upon the above described premises. P14a, 5 and P16a, 25. The warrants did not describe anything to be searched for or seized but authorized a search "for money and evidence used in connection with the said alleged crime, including any materials or things used in connection with the place of said alleged crime in and upon said described premises." P15a, 14 and P17a, 32. These, therefore, authorized general searches and were violation of the Fourth Amendment. *Marron vs. United States* 275 U. S. 192, 48 Supreme Court 74 (1927). The Supreme Court of New Jersey, in its opinion, held that the description of the property to be seized was quite sufficient.

Additionally, there was no Statute which authorized the issuance of a search warrant in gaming cases. The fourth Amendment to the Constitution of the United States was engrafted upon the Constitution because there had been wide spread abuses of search warrants in the Mother Country which the founders of our Government emphatically desired to prevent in this Country. At common law, the use of search warrants was confined to proceedings for the discovery and seizure of stolen goods. The efficacy of the warrant was turned to political seizures and the Constitutional Amendment was adopted for the purpose of preventing these abuses. The use of these writs is, therefore, limited to cases in which it is authorized by Statute or for the discovery and seizure of stolen goods as at common law, 47 Am. Jur. page 503, paragraph 2 and page 511, paragraph 14. See also *State vs. certain contraceptive materials* 126 Conn. 428, 11 At. 2nd 863 (1940); *State ex rel. Streit vs. Justice Court* 45 Mont. 375, 123 Pacific 405 48 LRA (NS) 156; *People ex rel. Robert Simpson Company vs. Kempner*, 208 N. Y. 16,

101 N. E. 794, 46 LRA (NS) 970 Ann. Cas. 1914D 169; *Smith vs. McDuffee*, 72 Ore. 276, 142 Pacific 558, 143 Pacific 929 Ann. Cas. 1916D 947.

The instances in which the issuance of search warrants is authorized by Statute in New Jersey are few. The opinion of Chief Justice Weintraub contains a virtual catalog of such. His references do not include any authorization for the issuance of search warrants in gambling cases or in cases generally involving a breach of the criminal laws.

The Supreme Court of New Jersey found it unobjectionable from a point of view of the law of that State that the issuance of a search warrant is not authorized by Statute. The Statute Law of New Jersey expressly authorizes the searches and seizures in liquor cases, Revised Statutes of New Jersey 1937 33:1-56 - 66; In aid of the enforcement of duties of the Department of Agriculture, New Jersey Statutes Annotated 4:1-24 in cases where bottles, containers or receptacles are being used in violation of the State Trade Laws New Jersey Statutes Annotated 56:3-25; in cases for the protection of owners of milk or cream cans, New Jersey Statutes Annotated 56:3-47; in cases involving cruelty to animals, Revised Statutes of New Jersey 1937 4:22-46; in cases involving the fish and game laws, Revised Statutes of New Jersey 1937 23:4-35; in cases involving health laws, Revised Statutes of New Jersey 1937 26:13-59 - 63 and, recently to certain narcotic and limited types of cases. The Court Below recognized this in the following language:

> "We find no substance in the second point, that the search warrants were void for want of a Statute expressly authorizing them with respect to violations of the gaming Statute, the authority is implicit in the judicial power and is acknowledged in the very provision of the Statutes upon which Plaintiffs rely. A different view cannot be found in the circumstance that the Legislature has expressly authorized searches in some situations, largely in aid of regulatory measures not involving criminal liability, such as, R. S. 4:1-23; R. S. 23:4-35; R. S. 23:10-20; R. S. 26:3-59; R. S. 55:11-16; R. S. 56:3-25 and 47, New Jersey SA; or that the Legislature saw

fit to regulate searches and seizures in the field of alcoholic beverages R. S. 33:1-56 et seq. N. J. S. A., wherein we note, that a provision appears for the return of lawful property illegally seized under colors of a warrant, R. S. 33:1-62, N. J. S. A. and certain abuses connected with searches are denounced as misdemeanors R. S. 33:1-64 and 65; N. J. S. A.

In application of Berlin, 19 N. J. 522, 117 At. 2nd 610 1955 in which a search warrant in connection with a gaming offense was sustained, no one suggested the issue here tendered and doubtless cause of the common acceptance of the proposition that the power is inherent."

If it be the law of New Jersey that the power to issue a search warrant is inherent in the judicial department, we do not believe that such is or ought to be the law of the United States. If this is the law, there is no limit to which the uses of a search warrant may be put. This is the very reason that the Fourth Amendment was adopted. We, therefore, conceive the law of the United States applicable to the Fourth Amendment to be that except in cases of stolen property, search warrants may be issued only in that type of case specifically authorized by Statute.

The Supreme Court of New Jersey also considered that the papers and things to be seized were sufficiently and explicitly described. It that be the law of the State of New Jersey, it is not consonant with the pronouncements of this Court which construe the Fourth Amendment. *Marron vs. United States*, 275 U. S. 192, 48 Supreme Court, 75 (1927).

Under New Jersey law, the issuance of a search warrant is not judicially reviewable. *State vs. Springer*, 57 N. J. Law 353, 31 At. 215 (1894). Neither will a motion to suppress evidence unlawfully searched for and seized be entertained. *State vs. Black*, 5 New Jersey Misc. 48, 135 At. 685 (1926); *State vs. First Criminal Judicial Court of Bergen County*, 10 New Jersey Misc. 715; 160 At. 672 (1932); *In re 301 – 317 Clinton Avenue*, 35 New Jersey Superior 136 (1955).

We believe that the searches and seizures in the cases at bar were unreasonable searches and seizures judged by federal standards and that the seizure taking and retention of the petitioner's property was in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States.

2.

**The Complaint Stated Claims Federally Protected Upon Which Relief Could and Should Have Been Granted.**

In the case at bar, the petitioners were victimized by an illegal search. The Supreme Court of New Jersey concedes that the search warrants relied upon for the searches were void for want of jurisdiction in the magistrate to issue them. We have endeavored to point out a number of other reasons why the search and seizure was illegal and unreasonable. Whatever be the reason, a start can be made on the premise that the state police conducted raids upon the petitioners' homes without the benefit of any valid search warrant. In the course of their search they discovered certain property and money which they seized and took away. They have retained these papers and money until the present time. The complaint charges that these officers are members of a department under the direct supervision of the defendant, Mr. Furman, who is the Attorney General of New Jersey (P20a, 24, P31a, 14). Since the search was clearly illegal and unreasonable, the seizure was also illegal and unreasonable. The officers who seized and took the petitioners' property were trespassers on the property rights of the petitioners. The retention by Mr. Furman's agents of the petitioners' property is a continuing wrong. It is as wrong today as it was on the day of the seizure. If the retention of this property is continued it will be as wrong tomorrow as it is today.

This court in an opinion by Mr. Justice Day, in *Weeks v. United States*, 232 U. S. 383, 393 (1913), phrased our contention in the following language:

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense the protection of the Fourth Amendment declaring his right to be secure against searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

This court has therefore held that, 1. the seizure, 2. the holding, and 3. the using in evidence against a citizen accused of an offense of his property seized in violation of the Fourth Amendment are themselves violations of the Fourth Amendment.

In *Wolf v. People of Colorado*, 338 U.S. 25, 69 S. Ct. 1359, this court held that the provisions of the Fourth Amendment are now applicable through the due process of law clause of the Fourteenth Amendment to the actions of states and state officers. In that case this court did however hold that the state courts had the right to prescribe their own rules of evidence and if they prescribed and followed the non-exclusionary rule of evidence that a conviction based upon such evidence would not be violative of the Fourth and Fourteenth Amendments. Our contention in this case assumes that that holding of the *Wolf* case would be adhered to by this court today.

We contend that the Fourth Amendment as interpreted by this court in the *Weeks* case and the Fourteenth Amendment as applied by this court in the *Wolf* case, demonstrate that it is wrong for an attorney general through his subordinates to hold and use in evidence against citizens charged with crime the property of those citizens taken in an unlawful search and seizure and that this contention does not interfere with the right of the state courts to prescribe whatever rules of evidence it will. If it is wrong for the agents of the attorney general to hold petitioners' property today, it is wrong for the attorney general to hold it tomorrow. It is wrong for the attorney general to show it to other people including judges and jurors and it is wrong for him to use it in a state court even though the rules of evidence established and followed by that court permit it.

The reason that it is wrong is, first, that the *Weeks* case which interprets the Fourth Amendment declares that it is wrong to do so. Secondly, the Attorney General of New Jersey and the Courty Prosecutor of Burlington County, who are the defendants in this suit, are required by Article VI, Clause 3, of the Constitution of the United States, to be bound by oath or affirmation to support the Constitution of the United States. Petitioners' complaint alleges that they have taken this oath. (P22a, 35, P31a, 34). Their oath is, therefore, the measure of their duty. This court so held in an opinion by Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137 (1803), in the following language:

> "From these, and many other selections which might be made, it is apparent, that the framers of the Constitution contemplated that instrument as a rule for the government of the courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!
>
> "The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on the subject. It is in these words: 'I do solemnly swear, that I will administer justice, without respect to persons, and do equal rights to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as * * *, according to the best of my abilities and understanding, agreeable to the Constitution and laws of the United States.' Why does a judge swear to discharge his duties agreeable to the Constitution of the United States, if that Constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime." *Marbury v. Madison*, 1 Cranch 137, 180 (1803).

Chief Justice Taney held likewise when he wrote in *Abelman v. Booth*, 21 How. 506, 525 (1858):

> "Now is there anything in this supremacy of the general government, or the jurisdiction of its judicial tribunals, to awaken the jealousy or offend the natural and and just pride of a state sovereignty. Neither this Government, nor the powers of which we are speaking, were forced upon the States. The Constitution of the United States, with all the powers conferred by it on the General Government, and surrendered by the States, was the voluntary act of the people of the several States, deliberately done, for their own protection and safety against injustice from one another. And their anxiety to preserve it in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State, is proved by the clause which requires that the Members of the State Legislatures, and all executive and judicial officers of the several States, (as well as those of the General Government), shall be bound by oath or affirmation, to support this Constitution. This is the last and closing clause of the Constitution, and inserted when the whole frame of the Government, with the powers hereinbefore specified, had been adopted by the Convention; and it was in that form, and with these powers, that the Constitution was submitted to the people of the several States, for their consideration and decision.
>
> "Now it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign State to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a State of this Union. On the contrary, the highest honor of sovereignty is untarnished faith. And certainly, no faith could be more

deliberately and solemnly pledged than that which every State has plighted to the other States to support the Constitution as it is, in all its provisions, until they shall be altered in the manner which the Constitution itself prescribes. In the emphatic language of the pledge required, it is to support this Constitution. And no power is more clearly conferred by the Constitution and laws of the United States, than that the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws; and for that purpose to bring here to revision, by writ of error, the judgment of a state court, where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the state."

The Appellate Division of the Superior Court of New Jersey in dealing with this subject held that since it was the duty of the Attorney General and Prosecutor to prosecute, their duty lay in producing to the court that evidence which the court had by a long line of decisions declared to be admissable evidence and that any digression from their oath to support the Constitution of the United States should be dealt with by other sanctions. (P68a, 20 – P69a, 5).

The view of the Appellate Division, it seems to us, overlooks the "supremacy clause" in Clause 2 of Article VI of the Constitution of the United States and the case of *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319. As a matter of fact in *Abelman v. Booth*, *supra*, the holding of this court was that when a state attorney general finds that his duties imposed by state law direct him in one direction and his oath to support the Constitution of the United States points to another direction, it is his duty to obey the Constitution of the United States.

Very recently this court has dealt with this same issue in another form. In *In re Estate of Stephen Girard, deceased*, 386 Pa. 548, 127 A. 2d 287 (1956), the Supreme Court of Pennsylvania, held that under the law of that state a will which established a trust for "poor male white orphan children" was one which was not subject to or controlled by

state action, was valid, and was beyond the orbit of the Fourteenth Amendment. This court, however, held that since an agency of the State of Pennsylvania was operating the trust as a trustee, its discrimination against the admission of negroes to the benefits of the trust was forbidden by the Fourteenth Amendment. In that case although the Supreme Court of Pennsylvania held that under state law it was perfectly legal for a trust to discriminate against members of the colored race in favor of members of the white race, this court held that state officers could not participate in the discrimination because the Fourteenth Amendment to the Constitution forbade them to do so. We think that case is parallel with the ones at bar. This court has held in the *Wolf* case that a state may prescribe its own rule of evidence and that if it prescribes a different rule of evidence than this court pronounced in the *Weeks* case, a person subjected to the application of that rule of evidence could not complain that he had been denied due process of law. Granted therefore, that the state courts have this prerogative. The Attorney General and the County Prosecutor having taken an oath to support the Constitution of the United States and being required by the Constitution itself to take an oath to support the Constitution of the United States, including the Fourth and Fourteenth Amendments and the pronouncements of this court in *Weeks v. United States* and *Silverthorne Lumber Co. v. United States*, are in the same position as the Board of Directors of City Trusts was in the Girard will case. They were enjoined by the Fourth and Fourteenth Amendments not to violate the right of the petitioners to be secure in their property. They were forbidden by the Fourth Amendment as interpreted by the *Weeks* case to seize, to hold and to use in evidence against the petitioners that property of the petitioners seized in an unlawful search and seizure.

That New Jersey subscribes to the non-exclusionary rule cannot be doubted. See Table E of the Appendix to the opinion of Mr. Justice Frankfurter in *Wolf v. People of Colorado*, 338 U. S. 25, 35, 69 S. Ct. 1359, 1365, and the cases cited in the opinion of the Supreme Court of New Jersey below. *Eleuteri v. Richman*, 26 N. J. 506, 141 A. 2d 46, 48.

In addition a statute exists which makes money seized in a gambling raid prima facie contraband, which requires the money to be deposited with the county treasurer pending disposition of the charge, which provides for a forfeiture of the money in the event of a conviction and which places the burden of recovering the money in the event of an acquittal upon the claimant. Revised Statutes of New Jersey, 2A:152-7 to 10.

It is intimated by some authorities including the learned judges who heard this matter in both the Chancery and Appellate Divisions of the Superior Court of New Jersey, that a citizen victimized by an unlawful search and seizure has some remedy against the wrongdoer. Judge Haneman in the Chancery Division attempted to spell out the remedies. (P40a, 35 – P41a, 16, P50a, 19 – P51a, 39). And it comments that,

> "A fruitless violation leaves the innocent victim to the sorry remedy of an action for damages."

The Superior Court in the above cited portions of its opinion does not seem to share with firmness the opinion of the Chancery Judge as to what remedies were open to your petitioners. It suggested that there should be the remedy of suppression of the evidence but deferred to the Supreme Court of New Jersey for a determination of that question. (P67a, 5-17). One fact remains crystal clear that the petitioners as a part of the relief demanded by them in their complaint in this suit was for the return of their money and property from a defendant under whose command were the officers who had the physical possession of it. Even that relief the trial court denied. It would, therefore, seem that under the laws of New Jersey property seized in an unlawful search may be retained by the prosecuting officers at least until after acquittal of the owners and that meanwhile the owners are deprived of their property. This strongly suggests the taking of private property for public use without just compensation. In any event, it literally amounts to a taking and retention of the petitioners' property not only without due process of law but without any process of law. Such a situation points up the fact that the only remedy which the petitioners have is their

remedy under the Constitution of the United States.

The defendants have relied upon *Stefanelli v. Minard*, 342 U. S. 117, 72 S. Ct. 118, 96 L. Ed. 138 (1951), and so has the Supreme Court of New Jersey. 26 N. J. 506, 141 A. 2d 46, 49. That case is no authority here. Its holding did not reach the merits of this case. It was a case instituted in the United States District Court for the District of New Jersey to enjoin a county prosecutor from using in a state court evidence obtained as a result of an unlawful search and seizure. What this court did hold was that although the District Court may have had jurisdiction to entertain the action and grant the relief sought, that a sound legal discretion directed that the jurisdiction should not be exercised. Such was also the holding of the United States District Court and the United States Court of Appeals. In the latter court, it stated in its per curiam opinion that every question there raised could have been asserted by the plaintiffs in the state courts of New Jersey and that the way to the Supreme Court of the United States lies open. The very procedure suggested by that court is the procedure we have adopted and we now seek the remedy in this court which the United States Court of Appeals for the Third Circuit thought was available.

We seek injunctive relief and that type of relief seems to be appropriate and to have received the approval of this court. In *Rea v. United States*, 350 U. S. 214, 76 S. Ct. 292 (1956), this court reversed the judgments of the United States District Court for the District of New Mexico and the United States Court of Appeals for the Tenth Circuit which denied an injunction to a citizen who had been subjected to an unlawful search and seizure by a federal officer, who, after the evidence had been suppressed in the United States District Court threatened to take the same evidence to a state Court following the non-exclusionary rule. The holding of this court was that an injunction should lie against the federal agent.

The remedy of injunction is not inappropriate in the courts of New Jersey. In *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910 (1907), the Court of Errors and Appeals held that a right of privacy exists in New Jersey which equity will protect even

in the absence of a property right.

In *Brex v. Smith*, 104 N. J. Eq. 386, 146 A. 34 (1929), the Court of Chancery restrained a county prosecutor from examining the bank records of certain policemen and their wives in violation of their right of privacy.

The attorney general was enjoined in *McGovern v. Van Riper*, 137 N. J. Eq. 24 (1945), affirmed in 137 N. J. Eq. 548 (1945), and his assistant, *Frey v. Dixon*, 141 N. J. Eq. 481, from violating a citizen's right of privacy. So also were county prosecutors. *O'Brien v. Scott*, 20 N. J. Super. 132 (1952), *S. & R. Amusement Corp. v. Quinn*, 136 N. J. Eq. 420 (1944).

Since the right exists and the remedy seems to be appropriate, we do ask for a writ of certiorari from this court to the end that the federal rights of the petitioners here may be fully vindicated.

3.

**The Charge in the Plaintiffs' Complaint That the State and Its Law Enforcement Officers, Including the Defendants, Had and Were Affirmatively Sanctioning, Practicing and Encouraging Unlawful, Unwarranted, Unjustifiable and Unconstitutional Police Incursion Into the Privacy of Its Citizens and That the Searches and Seizures Complained of Were Part and Parcel of This Policy, States a Federally Protected Cause of Action for Which Relief Could and Should Have Been Granted.**

In *Wolf v. People of Colorado*, 338 U. S. 25, 28, 69 S. Ct. 1359, 1361 (1949), this court in an opinion by Mr. Justice Frankfurter, said:

> "Accordingly, we have no hesitation in saying that were a State to affirmatively sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such an arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution."

In their complaint, the petitioners charged almost exactly in the language of Mr. Justice Frankfurter that because New Jersey has long adhered to the non-exclusionary rule "the State of New Jersey and its law enforcement officers, including attorneys general and county prosecutors and specifically including the defendants herein, has affirmatively sanctioned, practiced and encouraged unlawful, unwarranted, unjustifiable and unconstitutional police incursion into the privacy of the citizens of said state and law enforcement officers including the defendants have been encouraged to and have themselves encouraged others

subordinate to them and under their jurisdiction and control to take advantage of unconstitutional and unlawful searches of the persons and property of the citizens of New Jersey and of the unlawful and unconstitutional seizure of their property, well knowing that under the construction of the searches and seizures placed thereupon by the courts of this state, the people in effect have no guarantee of security against unreasonable searches and seizures by their constitution, but merely a court given right of action for damages." etc. (P25a, 5-26, P31a, 40). They also charged in their complaint that the illegal searches and seizures specifically complained of by them was part and parcel of this policy. (P28a, 20; P34a, 19).

Conceiving that they had pleaded a cause of action on the authority of *Wolf v. People of Colorado, supra,* the petitioners sought the return of their property or its destruction by the court or an injunction against its use by the defendants.

Since the sufficiency of this allegation arose on a motion for summary judgment on the ground that a case was not stated for which relief could be granted, the issue arose on what was equivalent to a common law demurrer and in such a situation allegations of fact well pleaded must be taken as true for the purpose of the motion.

The Appellate Division of the Superior Court dealt with this issue in the following language:

> "Neither the complaint nor anything said on behalf of the plaintiffs in the argument supports the thought that their contention is anything more than that the case rule against suppression or exclusion of illegally secured evidence tends to encourage violation of the constitutional guarantee. This is not an affirmative sanction by the State of illegal searches and seizures. There is no suggestion of any concerted, planned or general program by the state law enforcement authorities for disregard of the constitutional requirements for search and seizure." (P69a, 17-27).

The comment of the Supreme Court of New Jersey on this same issue was:

> "We agree with the Appellate Division that this charge is a mere assembly of generalities, devoid of specific content. At the oral argument we invited particularization, but nothing emerged to justify the probable purpose of the pleader to wedge into the area in which the Supreme Court indicated in Wolf that it would intervene. At any rate, plaintiffs are not victims of the program they vaguely allege. It is not asserted that the trooper selected the wrong magistrate to obtain warrants he knew proper magistrates would have refused." 26 N. J. 506, 141 A. 2d 46, 52.

We think when we say that such a policy exists and has many years existed and that the defendants are participating in it and that they have practiced, sanctioned and encouraged unlawful, unwarranted, unjustifiable and unconstitutional police incursion into the privacy of citizens and that the searches and seizures in this case were a part of that activity, that we have made a charge which we are entitled to an opportunity to prove.

Rule 4:8-5 promulgated by the Supreme Court of New Jersey is identical with Rule 8 (e) (1) of the Federal Rules of Civil Procedure:

> "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."

The Supreme Court of New Jersey has also promulgated as one of the rules of practice its Rule 4:9-3, as follows:

> "Acts and contracts may be stated according to their legal effect, but in so doing the pleading should be such as fairly to apprise the adverse party of the states of facts which it is intended to prove; thus, an act or promise of a principal other than a corporation, if in fact proceeding from an agent known to the pleader, should be so stated. In pleading an official document or official act it is sufficient to aver that the document was executed or the act done in compliance with law."

The State of New Jersey has attempted to abolish many of the technical aspects of pleading and to adopt rules of pleading and practice largely following the Federal Rules of Civil Procedure. Niceties in pleading are no longer required. We think petitioners simply, concisely and directly pleaded according to legal effect and did so in a manner such as fairly to apprise the defendants of the state of facts which it was intended to prove. By affirming the grant of a summary judgment, the Supreme Court of New Jersey did not give the plaintiffs' pleading fully credit but in effect took issue with the factual statements contained therein. The petitioners did state a cause of action based upon a federal right which they should have had an opportunity to sustain by evidence. The action of each of the courts of the State of New Jersey in which the matter has been has had the effect of denying this right to the petitioners and therefore of denying them the enforcement of their federal right.

*I.*

Appended hereto are copies of the opinion of Chief Justice Weintraub in the Supreme Court of New Jersey, of the mandate of the Supreme Court of New Jersey on affirmance, and of the motion for and an order granting substitution of a party defendant.

Respectfully submitted,

JAMES M. DAVIS, JR.
*Attorney of Petitioners*
110 High Street
Mount Holly, N. J.

# APPENDIX

## OPINION

Argued March 4, 1958. Decided

On appeal from the Superior Court, Appellate Division.

Mr. James M. Davis, Jr. argued the cause for Plaintiffs-Appellants. Messrs. Powell and Davis, Attorneys.

Mr. David D. Furman, Deputy Attorney General of New Jersey argued the cause for Defendants-Respondents. Mr. Grover C. Richman, Jr., Attorney General of New Jersey, Attorney. Mr. David D. Furman, Of Counsel. Mr. Harold J. Ashby, Deputy Attorney General, On the Brief.

The opinion of the Court was delivered by
WEINTRAUB, C. J.

On August 22, 1954, a member of the New Jersey State Police applied to the magistrate of the Municipal Court of Chesterfield Township for search warrants. His affidavits alleged just and reasonable cause to believe that gaming was taking place in violation of *N. J. S.* 24:112-3. The premises were described respectively as 134 Second Street in the City of Bordentown and 54 East Main Street in the Township of Mansfield. The search warrants issued and were executed.

Plaintiffs filed a complaint in the Chancery Division of the Superior Court seeking among other things to suppress the product of the raids. Both plaintiffs alleged illegality in that (1) the magistrate was without authority to issue a warrant for a search beyond the territorial limits of his court, (2) no authority exists for a warrant in connection with gambling, and (3) the warrants do not "particularly" describe the papers and things to be seized as required by Article I, paragraph 7 of the Constitution of New Jersey. In the course of his complaint, plaintiff Damey described the premises searched as 52 East Main Street (the warrant read "54") but no charge of illegality by reason of that variance is specifically pleaded. Both plaintiffs allege indictments

were procured on the basis of the papers and property seized and add that the State "will rely upon the same at the trial of said indictment and in the absence of the same cannot prove a prima facie case under said indictment."

Defendants obtained summary judgment on motion. 43 N. J. Super. 303 (Ch. Div. 1956). The Appellate Division affirmed, 47 N. J. Super. 1 (1957), and plaintiffs are before us as of right because of the constitutional questions asserted.

The State concedes the magistrate was without authority to issue a warrant for a search beyond the territorial jurisdiction of his court, *N. J. S.* 2A:8-20, and we think the concession is correct.

We find no substance in the second point, that the search warrants were void for want of a statute expressly authorizing them with respect to violations of the gaming statutes. The authority is implicit in the judicial power and is acknowledged in the very provision of the Constitution upon which plaintiffs rely. A different view cannot be found in the circumstance that the Legislature has expressly authorized searches in some situations, largely in aid of regulatory measures not involving criminal liability, such as *R. S.* 4:1-23; *R. S.* 23:4-35; *R. S.* 23:10-20; *R. S.* 26:3-59; *R. S.* 55:11-16; *R. S.* 56:3-25 and 47; or that the Legislature saw fit to regulate searches and seizures in the field of alcoholic beverages, *R. S.* 33:1-56, *et seq.*, wherein we note, parenthetically, that a provision appears for the return of lawful property illegally seized under color of a warrant, *R. S.* 33:1-52, and certain abuses connected with searches are denounced as misdemeanors, *R. S.* 33:1-64 and 65. In *Application of Berlin*, 19 N. J. 522 (1955), in which a search warrant in connection with a gaming offense was sustained, no one suggested the issue here tendered, and doubtless because of the common acceptance of the proposition that the power is inherent.

As to the third objection, we fail to understand how the papers and things to be seized could be more explicitly des-

cribed. And with respect to plaintiff Danley, if we assume he pleads illegality because of the variance in the street number, it is enough to say that if that claim be correct, it would add nothing decisive to the conceded illegality arising out of the magistrate's lack of authority.

In sum total, for the purpose of this appeal, illegality is clear, but equally clear is the fact that the trooper in good faith attempted to comply with the applicable mandate of the Constitutions, Federal and State, that a magistrate's decision intervene between the police and the search.

Plaintiffs recognize that this State has adhered to the rule that proof otherwise admissible will be received notwithstanding illegality of search and seizure. *State v. Alexander*, 7 N. J. 585, 594 (1951), *certiorari denied*, 343 U. S. 908 (1952); *State v. Lyons*, 99 N. J. L. 301 (E. & A. 1923); *State v. Merra*, 103 N. J. L. 361 (E. & A. 1927); *State v. Cortese*, 104 N. J. L. 447 (E. & A. 1927) *affirming* 4 N. J. Misc. 683 (Sup. Ct. 1926); *State v. Guida*, 119 N. J. L. 464 (E. & A. 1938), *affirming* 118 N. J. L. 289 (Sup. Ct. 1937). They contend, however, that the rule is designed to avoid interruption of a criminal trial by collateral inquiries, and hence that a proceeding may be maintained in advance of the trial for the return or suppression of the matters seized. In jurisdictions which exclude evidence obtained by unreasonable search and seizure, an objection at trial may come too late. 2 *Wharton, Criminal Evidence* (12th ed. 1955), § 699, p. 705. See, for example, Rule 41(e) of the Federal Rules of Criminal Procedure. Reliance is also placed upon the fact that in several of our cases the denial of an application for the return of the seized property was upheld upon a finding that the search or warrant was lawful, without ruling upon the right to relief if illegality had appeared. *Application of Berlin, supra* (19 N. J. at 531); *State v. Giberson*, 99 N. J. L. 85 (E. & A. 1923); *State v. Mausert*, 88 N. J. L. 286 (E. & A. 1915). But our rule of admissibility does not hinge upon the mode or time of an application to suppress but rather rests upon a policy decision that competent proof shall be available for the prosecu-

tion of the offense notwithstanding illegality in the seizure. *State v. First Criminal Judicial District Court*, 10 N. J. Misc. 715 (Sup. Ct. 1932); *State v. Black*, 5 N. J. Misc. 48 (Ct. Quart. Sess. 1926). It was undoubtedly because of this understanding of our cases that this court omitted to adopt Federal Rule 41(e), cited above, when our rules of court were promulgated.

Our rules being silent as to procedure, we pass the adjective aspect with, however, the observation that it is contrary to our basic thesis to parcel a controversey among several trial courts. An application to the court in which the indictments are pending is the course which here would have been consonant with our approach. We nonetheless accept the meritorious issue, as did the Appellate Division. That court reviewed the subject exhaustively and concluded that, although it believed illegally seized proof should be suppressed, the issue should be settled by us.

The leading advocate of the exclusionary doctrine is the United States Supreme Court which ruled for federal purposes that evidence seized in violation of the Fourth Amendment must be returned or suppressed upon suitable application. *Weeks v. United States*, 232 U. S. 383 (1914). In *Wolf v. Colorado*, 338 U. S. 25 (1949), the court held the Fourth Amendment applicable to the States by way of the due process clause of the Fourteenth, but that the rule of exclusion "was not derived from the explicit requirements of the Fourth Amendment" but rather "was a matter of judicial implication" and as such is not binding upon the States. The court added, however, that it had "no hesitation in saying that were State affirmatively to sanction such police incursions into privacy it would run counter to the guaranty of the Fourteenth Amendment." (338 U. S. at 28). The court has declined to interfere with a state prosecution notwithstanding a claimed violation of the Federal Civil Rights Act. *Stefanelli v. Minard*, 342 U. S. 117 (1951); *cf Irvine v. California*, 347 U. S. 128 (1954).

The *Weeks* case unsettled confidence in the rule of admissibility, but a majority of the states, many after searching reconsideration, has retained it. *Wolf v. Colorado, supra* (338 U. S. at 29); *annotation* 50 *A. L. R.* 2d 531, 535 (1956).

Article I, paragraph 7 of our State Constitution of 1947 repeats the earlier guaranty of the Constitution of 1844, in turn borrowed from the Fourth Amendment. At the Constitutional Convention of 1947, an amendment was proposed:

> "Nothing obtained in violation hereof shall be received into evidence."

The issue was debated, with specific reference to the merits of the federal rule. One delegate added that in any event he questioned the advisability of incorporating an answer either way in organic law. The amendment was defeated by a vote of 46 to 25. 1 *Convention Proceedings Record*, 598, 608. We do not infer that the delegates intended thereby to embed our case law, but it is equally clear that the rule of exclusion is not the unmistakable wake of the constitutional provision. Had the Constitution decided the issue, we would not concern ourselves with the utility or consequences of the decision. The question however being unresolved by either the Federal or State Constitutions, we must strike a balance between the contending interests.

The guaranty is agreed to be one of the great imperatives of a decent society. It stands between the citizen and a police state. The quarrel centers about the need, appropriateness, and efficacy of the exclusionary rule. The force of the pros and cons is reflected by the sharply divided and spirited views among the courts and academic writers. 8 *Wigmore, Evidence* (3d ed. 1940), § 2183, *et seq.*; *McCormick, Evidence* (1954), § 137, *et. seq.*

The exclusionary rule rests upon two propositions. The first is that government should not stoop to the "dirty business" of a criminal in order to catch him. The second is that civil and criminal remedies against the offending officer are as a practical matter ineffective, and hence the rule of ex-

clusion is the only available remedy to protect society from the excesses which led to the constitutional right.

On the other side, many considerations are aggregated. The issue arises only when the evidence is incriminating and thus, in its immediate impact, the rule of exclusion benefits only the guilty. Unlike the extorted confession, to which an analogy is frequently drawn, the evidence illegally seized is not the fruit of official wrong; it is the criminal's own work product which could have been seized lawfully and used against him. If such evidence and "the fruit of the poisonous tree" are suppressed, "The criminal is to go free because the constable has blundered." *People v. Defore*, 242 N. Y. 13, 150 N. E. 585, 587 (Ct. App. 1926), *certiorari denied*, 270 U. S. 657 (1926). Two wrongs go unpunished, at the expense of society. 8 *Wigmore, supra*, § 2184, p. 40. Unlike the federal government for which the exclusionary rule was conceived, the States must contend with many more crimes of violence. The stakes are different.

It is further argued that the federal rule has been denied its logical sweep, *People v. Defore, supra; comment*, 58 Yale L. J. 144 (1948), thus evidencing its unwisdom, 8 *Wigmore, supra*, § 2184a, p. 41. For example, the federal courts will not apply their rule if the constitutional right invaded was not that of the defendant (but see *United States v. Jeffers*, 342 U. S. 48 (1951)), or if the infraction of the Fourth is by a state officer acting independently of a federal representative (this latter proposition at the moment is an open question, *Benanti v. United States*, 355 U. S. ——, n. 10 (1957)). The evidence may be used on cross-examination if the defendant's direct testimony invites contradiction. *Walder v. United States*, 347 U. S. 62 (1954).

The most serious criticism is that the exclusionary rule has led to a myriad of minute and vague distinctions, enveloping with uncertainty an area in which enforcement officials must know what they may and may not do. *State v. Mara*, 26 N. H. 463, 78 A. 2d 922 (Sup. Ct. 1951). "Even as to the substantive rule governing federal searches in violation of

the Fourth Amendment, both the Court and individual Justices have wavered considerably." *Irvine v. California, supra* (347 U. S. at 134).

And lastly it is urged there is no persuasive evidence that the constitutional guaranty fares better in jurisdictions which embrace the federal rule. *Irvine v. California, supra* (347 U. S. at 135-37); Grant, *Circumventing the Fourth Amendment*, 14 So. Calif. L. Rev. 359 (1941). The refusal of a majority of the United States Supreme Court to apply the exclusionary rule to the States is itself suggestive of doubt as to the soundness of the rule in the area of state responsibility.

The return or suppression of evidence of crime is not a remedy, in a strict sense, of the constitutional wrong. It would protect the victim against the aftermath, but would not compensate him for the invasion of his privacy. Nor are property rights as such in issue on the application; defendant does not seek to recover property for its intrinsic value, but rather seeks to bar the use of it or secondary testimony with respect to it as evidence against him. Hence the exclusionary rule has the role of a deterrent—a device to compel respect for the guaranty by removing an incentive to disregard it. It is calculated to prevent; not to repair. The postulate is an enforcement official indifferent to basic rights. Thus in *Wolf*, Mr. Justice Frankfurter stated the question to be "(h)ow such arbitrary conduct should be checked" (338 U. S. at 28) and referred to the exclusion of evidence as a "way of deterring unreasonable searches" (p. 31). Mr. Justice Douglas, dissenting, described the exclusionary rule as the only "effective sanction" (p. 40). Mr. Justice Murphy, dissenting, spoke of "a positive deterrent to police and prosecutors tempted to violate the Fourth Amendment" (p. 42). Mr. Justice Rutledge, also dissenting, agreed "the Amendment without the sanction is a dead letter" (p. 47).

In the debate of the issue the guaranty is pitted against "dirty business". The issue was stated in *People v. Defore, supra* (150 N. E. at 589):

"On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office."

The same hypothesis is implicit in the analogy to the extorted confession and the further analogy to the federal treatment of a violation of its wire-tap statute. The analogies are not always apt. The extorted confession invariably involves contempt for constitutional right, and the wire-tap necessarily involves a willful violation of a criminal statute. An illegal search and seizure, on the other hand, does not inevitably import conscious illegality. On the contrary, there may be no purpose to flout the Constitution, but only a failure in good faith to stay within the complex rules relating to search and seizure. It is one thing to condemn the product of an arrogant defiance of the Constitution; it is another to impose the sanction when the official intends to respect his oath of office but is found to be mistaken, let us say, by the margin of a single vote.

If the sanction is needed, it would seem to be fitting when there are echoes of the odious writ to search everywhere for anything, or other affronts to the concept of ordered liberty. If the purpose is to protect the guaranty against intentional disregard, why go beyond that target? Surely a breach of the intricate rules of search and seizure under or without a warrant cannot be equated with insolence in office. If a wider sanction is justified, it can only be on the uncertain ground that anything less would be inadequate or unworkable.

As matters now stand, a state may select all, part or none of the exclusionary doctrine. Maryland, for example, legislated the exclusionary rule as to some misdemeanors except in certain portions of that state, but continued the rule of admissibility as to felonies and the misdemeanors excepted. *Salsburg v. Maryland*, 346 U. S. 545 (1954). In South Dakota, after its court adopted the federal rule, the legislature restored the rule of admissibility where the search is made under the color of a warrant. *State v. Lane*, 82 N. W. 2d 286 (S. D. Sup. Ct. 1957). Alabama legislated

the exclusionary rule in the narrow area of offenses against the liquor laws. *Annotation*, 50 *A. L. R.* 2d 531, 555 (1956). Our Legislature, as stated above, spoke to a limited extent in the alcoholic beverage law. *R. S.* 33:1-62.

California switched to the exclusionary doctrine by one vote. *People v. Cahan*, 44 Cal. 2d, 434, 282 P. 2d 905 (Sup. Ct. 1955). The case involved "deliberate, flagrant acts in violation of both Constitutions and the laws enacted thereunder." The court referred to the criticism of the subsidiary rules concerning unreasonable search and seizure developed by the federal courts and expressly reserved to itself the adadoption of workable principles. In footnote 4, the court recognized that unreasonable searches and seizures

> "may involve only minor intrusions of privacy or result from good-faith mistakes of judgment on the part of police officers. There is no reason, of course, why, if the exclusionary rule is adopted, appropriate exceptions could not be developed to govern these latter situations. On the other hand, deliberate, flagrant violations of the constitutional guarantees like those in the present case and in Irvine v. People of California, 347 US 128, 74 S. Ct. 381, may be as dangerous to ordered liberty as the coercion of confessions. (See Allen, Due Process and State Criminal Procedures, 48 Nw. L. Rev. 16, 26-27)."

See *Two Years with the Cahan Rule*, 9 Stanford L. Rev. 515 1957).

Before we overturn or depart from the long-standing rule of admissibility we should be convinced of the necessity, utility and workability of another approach. The judiciary of course is not the sole guardian of the Constitution. The executive branch is equally sworn to uphold it. That the executive here did respect the guaranty is evidence. The trooper did honor the constitutional mandate that a magistrate's judgment intervene between the police and the search. The judgment of a magistrate did intervene, albeit the wrong

magistrate. In this case we find neither "dirty business" nor any need for the sanction of exclusion to discourage it. If events should indicate an appreciable disposition in our State to flout the guaranty, we would not hesitate to seek a solution. The question may well await a more exciting set of facts.

Plaintiffs do allege that "for many years last past the State of New Jersey and its law enforcement officers, including attorneys general and county prosecutors and specifically the defendants herein, has affirmatively sanctioned, practised and encouraged unlawful, unwarranted, unjustifiable and unconstitutional police incursion into the privacy of the citizens of said state and law enforcement officials including the defendants have been encouraged to and have themselves encouraged others subordinate to them and under their jurisdiction and control to take advantage of unconstitutional and unlawful searches." We agree with the Appellate Division that this charge is a mere assembly of generalities, devoid of specific content. At the oral argument we invited particularization, but nothing emerged to justify the probable purpose of the pleader to wedge into the area in which the Federal Supreme Court indicated in *Wolf* that it would intervene. At any rate, plaintiffs are not victims of the program they vaguely allege. It is not asserted that the trooper selected the wrong magistrate to obtain warrants he knew the proper magistrates would have refused.

The judgment is accordingly affirmed.

## MANDATE ON AFFIRMANCE
(Filed 4/28/58)

This cause having been duly argued before this Court by Mr. James M. Davis, Jr., counsel for the appellants and Mr. David D. Furman, counsel for the respondents, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court–Appellate Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court–Appellate Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the twenty-eighth day of April, 1958.

John H. Gildea /s/
Clerk

*Clerk of the Supreme Court*

## MOTION FOR SUBSTITUTION OF PARTY DEFENDANT-RESPONDENT

And now come the plaintiffs-appellants, Harry Eleuteri and Edward Danley, and respectfully move that Honorable David D. Furman, acting Attorney General of New Jersey, be substituted as a party defendant-respondent, in the place and stead of Honorable Grover C. Richman, Jr., formerly the Attorney General of New Jersey.

POWELL AND DAVIS
*Attorneys for Plaintiffs-Appellants*

Dated:
May 5, 1958.

By JAMES B. DAVIS, JR.
*A Member of the Firm*

## ON MOTION FOR SUBSTITUTION OF PARTY DEFENDANT
(Filed 5/12/58)

This matter having been duly presented to the Court, it is Ordered that the motion for substitution of party defendant is granted.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this twelfth day of May 1958.

John H. Gildea /s/
Clerk